SAO 6/2010
BEFORE
HON'BLE MR JUSTICE P.K.SAIKIA

This second appeal is against the judgment dated 30.11.2005 passed by Civil Judge, Dibrugarh in T.A. No. 13 of 2005 setting aside the judgment and decree dated 01.03.2005 and 04.03.2005 passed by learned Munsiff No. 2, Dibrugarh in Title Suit No. 19 of 1995 and remanding the case to the trial court with a direction to decide the suit afresh after giving opportunities to both the parties to adduce evidence.

2. I have heard Mr. G.N. Sahewalla, learned Senior Counsel assisted by Md. Aslam for the appellant and Mr.B. Banerjee, learned counsel for the respondent.

3. In order to appreciate the dispute in this second appeal, I find it necessary to have a look at the story narrated in the plaint which gave rise to T.S. No. 19 of 1995 as well as the story, so narrated in the written statement of the defendants therein. It may be stated that the plaintiff filed aforesaid suit under the Assam Urban Areas Rent Control Act,1972 seeking eviction of the defendant No. 1 alleging that the defendants had committed default in payment of rent. The plaintiff also sought the eviction of defendants from the suit premises since the house in question is required by the plaintiff for her bonafide case.

4. The defendants having filed written statement contend that they were not defaulter in respect of the suit house since they continued to pay rent to the plaintiff personally in respect of such house till June 1984. However, since the plaintiff demanded the rent at exorbitant rate, the defendants started depositing rent in the court from the month of July 1984 in accordance with the requirements of the Rent Control Act and have been doing so ever since.

5. Their further contention was that suit house was never required for bona fide reasons. The plaintiff invented such theory just to get him out of the suit house. The defendants, therefore, submit the court below to dismiss the suit.

6. On the basis of pleadings of the parties, the following issues were framed -

1. Whether there is any cause of action for the suit ?
2. Whether the defendant is a defaulter ?
3. Whether the defendant made any alteration in the suit premises without any authority ?
4. Whether the plaintiff requires the suit premises bona fide for her use as alleged in the plaint ?
5. Whether the plaintiff is entitled to decree as prayed for ?
6. To what relief, if any, are the parties entitled to ?
7. Whether the suit is liable to be dismissed on the ground of non-joinder of parties ?

5. Both the sides adduced evidence to support their respective claim. On the basis of the evidence rendered by parties and having regard to the arguments advanced by the learned counsel for the parties, the learned trial court decided the suit in favour of the plaintiff on holding that the defendants were defaulter in respect of payment of rent. The trial Court also held that the plaintiff required the suit premises for her bona fide use. The discussion on issue No. 2 which deals with the allegation of defendants being defaulter is as follows :-

> In the plaint, the plaintiff have stated that the defendants are defaulters in paying rent since July, 1984. In her evidence, the plaintiff stated in her plaint that as per agreement, defendant was to pay rent at the rate of Rs. 100/- at the end of each month according to English calendar month. PW 1 stated in his evidence that PW 2 had oral agreement with late Makhan Chandra Deb Nath, father of defendant No. 1 stated in his evidence that the defendants stopped paying rent from July, 1984. Both PW 1 and PW 2 in their evidence have stated that they did not know if the defendants deposited rent I Court, and received any notice from Court.
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> As against the aforesaid evidence and pleadings, the defendant denied that he is a defaulter and stated in his pleading as well as in evidence that the plaintiff had demanded enhanced exorbitant rent and when the plaintiff refused t

o accept the stipulated rent, the predecessor of the defendant No. 1 deposited rent in Court since 1981. The defendant had replied to the notice issued by the advocate for the plaintiff (Ex. Ka) vide his notice thorough his advocate G.B. Roy Chudhury (Ex. Kha) that he had to deposit rent for July, 1984 in court under the rent control Act as the plaintiff was not willing to collect the rent from July, 1986. But whereas the plaintiff through Ext. 'Ka' had stated that the defendant defaulted payment in rent to her since the month of March, 1984. Though the plaintiff in his pleadings and evidence have stated that the defendant is a defaulter from July, 1984, the defendant has not mentioned anything in Ex. Kha about his being a defaulter from 1984. Besides, the defendant have stated that they have deposited rent in Court from July, 1981 but miserably failed to substantiate his contention by adducing credible evidence and reliable documents. The defendant has only could prove his depositing the rent from the year 1990 onwards in Court vide Ex. 'Ga' for the month of December, 1989 and not before thereto. The defendant though have proved the deposit of rent in Court from the year 1990, yet on perusal of the original treasury challans and petitions exhibited by him, it is seen that he was quite irregular in payments in Court. The defendant has failed to prove that on refusal of the plaintiff to accept rent, he deposited the rent in Court within a fortnight of its becoming due as provided u/s 5 (4) of the Assam Urban Areas Rent Control Act. There is neither any document nor any credible evidence on the part of the defendant to prove this stand. Therefore, the contention of the plaintiff hold good.

The learned counsel for the plaintiff has stated in his written argument that if it is admitted for arguments sake that the rent was paid upto June, 1986 and deposited in Court since July, 1986, still the defendant is a defaulter in law as held in 1998 (1) GLT 379 that the defendant is required to pay and continue to pay/deposit rent during pendency of the suit and to prove the same where as the defendant has vide Ex- Ga proved the first deposit of rent for the month of December, 1989 and not thereto before. The learned counsel further contended that the last deposit proved vide evidence of DW 2 since 18.06.03 to 29.10.03 was only for the months of October and November, 1999 and not thereafter. In this connection, the learned counsel for the plaintiff has placed reliance on the following citations to support his contention :-

(1) 1995 (23) GLJ 290
(2) 1995 (3) GLR 233

The learned counsel for the defendant has submitted through his written argument that it is the burden of the plaintiff to prove that the father of the defendant No. 1 defaulted in the payment of rent on and from July, 1981 as alleged in the plaint. It was also contended by the learned counsel for the defendant that in Ex. 'Kha', the reply to the plaintiff's counsel, it appears that rent was paid upto June, 1985 to the plaintiff by the original tenant, Sri Makhan Ch. Debnath. But the fact remains that actually it was stated in ex. Kha that rent was collected without granting any receipt upto June, 1986 and not June 1985. It also cannot be that it is the burden of the plaintiff to prove that he was a defaulter but on the contrary the defendant has admitted that he started depositing rent from July, 1984 but failed to produce any credible evidence or document.

Having gone through the contents of the judgments placed by the learned counsel for the plaintiff and examining the documents and evidence on record in the suit, this court have reached a conclusion that the defendant No. 1 is a defaulter in the eye of law. So, on this count, the defendant fails to get protection of law because law takes the side of the plaintiff.

6. In regard to issue which deals with the requirement of suit premises by the plaintiff on bona fide ground, learned trial court discussed and held as follows :-

In the plaint, the plaintiff has stated that her family is expending and so wants to have a separate passage to her residence and the suit premises attached to her residence is more convenient and suitable for the purpose and as such, she is in bona fide need to the suit premises. So, on 25.8.95, the plaintiff asked the defendants to vacate the suit premises but without any result. In her

evidence, the plaintiff as PW 2 stated that she wants the suit premise for her ingress and egress. PW 1, the son of PW 2 also stated in his evidence that they asked the defendant No. 1 to vacate the suit premises or they needed it for thei r ingress egress.

On the other hand, the defendants stated in their written statement that suit premises are nor bona fide required by the plaintiff. In his evidence, the defendant No. 1 as DW 1 stated that it is not true that the plaintiff wants the ir shop for their need for ingress and egress as the actual way for the plaintif f's ingress and egress is their shop which is near their shop. DW 1 in cross- ex amination that the plaintiff never told him that she needs the shop.

The learned counsel for the plaintiff has submitted in his writte n argument that the landlord is the best judge and his complete freedom in the matter of bona fide requirement. The learned counsel for the plaintiff have plac ed reliance on two citations on this point, namely,

(1) 1996 (3) GLR-331
(2) 1997 (1) GLR- 5

I have gone through the aforesaid decisions carefully. The learned co unsel for the plaintiff also stated in the written argument that under Section 5 (3) of the Assam Urban Areas Rent Control Act, 1972, the defendant/tenant has protection against illegal eviction on the ground of bonafide requirement.

The counsel for the defendants, on the other hand has submitted in their written argument that the admitted fact of the plaintiff's witnesses is that Minerna Stores was inducted in the vacant shop room after the settlement of the suit premises with Makhan Ch. Debnath and that if the suit premises is required for her ingress and egress, she would not have let out the vacant shop room to the Minerna Stores which is adjacent to the suit premises. However, the submi ssion of the learned counsel for the defendants cannot be considered as the Apex Court in a series of decisions has taken less rigorous view to prove the bonafi de requirement in the present context of the employment of the landlord's own pr operty, and as also as per the view taken in (1997) 1 GLR 5 passed by our Hon'bl e Gauhati High Court in Sekhar Chand Swami and Ors.- vs- on the death of Nandala l Agarwalla, his heirs and ors on bona fide requirement. In this instant case, b oth the plaintiff as PW 2 and her son, PW 1 has stated in their evidence that th ey need the suit premises bonafide for their ingress and egress to their house, considering all, I find that the plaintiff is in bonafide requirement of the su it premises and have proved it in their evidence. As such, this issue is accordi ngly decided in the positive and in favour of the plaintiff.

7. Since issue No. 5 and 6 were declared in favour of the plaintiff, the le arned Court below decreed the suit as follows :

Issue No. 5

The discussion in issue No. (2) and (4) show that he plaintiff is entitled to de cree as prayed for.

Issue (6) I find that no other relief, the parties are entitled to except herein mentioned below.

ORDER

The suit is decreed on contest with costs. The defendants are directed to vacate the suit premises by delivering khas possession to the plaintiff within a perio d of three months from today along with payment of arrear rent of Rs. 3600/- fai ling which the plaintiff will be entitled to eject the defendants by recourse of law.

Prepare decree accordingly.

8. Being aggrieved, the defendant No. 1/tenant preferred an appeal before t he Court of Civil Judge, Dibrugarh. On hearing the parties, the Civil Judge was pleased to conclude that the question whether the defendant No. 1 was a defaulte r or not was not appropriately adjudicated by the learned trial Court since alth ough the defendants had prayed for calling the records of relevant NJ cases to show that they were not the defaulters in payment of rent in respect of suit pre mises during the relevant time, the concerned Court refused to accept such praye r on holding that the concerned Clerk could not trace out those records which we

re called for at the behest of defendants in the aforementioned suit.

9. According to the learned appellate Court, such finding is perverse since it was the duty of the trial court to require the concerned Clerk to produce all the records, called for at the behest of the defendants, since the court cannot abdicate its duty of requiring the concerned Clerk to produce those records before the court, only on the plea of concerned Clerk that such records could not be traced out.

10. The relevant part of the judgment of the Appellate Court is also reproduced below :-

> Perused the memo of appeal.
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> I have heard at length ld. counsel for both sides.
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> Though a number of grounds were take in the memorandum of appeal, ld. counsel for the appellant has submitted in his argument that ld. Munsiff No. 2, Dibrugarh has decided the issue No. 2 erroneously and wrongly held that the defendant could not prove the payment of rent before 1990 whereas the Sheristadar of the court of Civil Judge, Jr. Divn., Dibrugarh could not produce the rent control cases beyond 1990.
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> Ld. counsel further submitted that it is the bounden duty of the Rent Control Office to produce the Rent Control cases in the suit as they are the custodian of the Rent Control cases and for non-production of all the Rent Control cases the court should not take the view that the defendant was defaulter.
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> It is averred by the defendants in the W.S., that as the plaintiff demanded exorbitant rent and refused to accept the stipulated rent, Late Makhan Chandra Debnath had to deposit rent in the court since July 1984.
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> A perusal of the impugned judgment, it appears that the trial court while deciding the issue No. 2 hold that there is neither any document nor any credible evidence on the part of the defendant to prove his stand .
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> From the above, it is abundantly clear that the trial court did not make any endeavour to direct the office of Civil Juge (Jr. Divn.), Dibrugarh for production of all the Rent Control cases in connection with the instant case or just decision of the case, and the same has caused serious prejudice to the defendant/appellant.
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> The court is the last resort to all the persons involved in litigation and it is the noble duty of the court to enquire all the matters involved in the suit thoroughly before coming to a concrete conclusion.
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> Further, it is also important to note that if the main contention of the parties in the suit is not discussed in the judgment, it caused serious prejudice to the parties.
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> Non -production and skipping to discuss the averments made by the parties do not reflect the cases of the contending parties and as such, the entire suit suffers from serious prejudices.
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> Under the discussion made above, I am firmly of the view that the suit needs to be remanded to the ld. trial court with direction as the same is a fit case for remand.
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> Under the discussion made above this court opines that better justice would be served to the parties in the suit if the ld. trial court call for all the Rent Control cases in connection with T.S. No. 19/95 from the office of Munsiff, Dibrugarh and decide the issue No. 2 afresh after giving opportunity to both the parties in the suit.

11. The learned counsel for the appellant/plaintiff now submits that the order of the appellate Court is unsustainable in law. It that connection, it has been stated that there is clear evidence on record to show that all the records which were called for by the defendant No. 1 were produced before the Court and same was done in response to requisition issued by the Trial Court. In support of such contention, my attention has been drawn to Ext. 2 which the letter issued by trial Court asking the Sheristadar of the office of the Civil Judge, No. 2, Junior Division, Dibrugarh to produce NJ cases from 1992 to 2001.

12. It has further been contended that all the records called for through Ext. 2 were produced before the Court during trial. Therefore, the finding of the appellate Court that all the records, sought to be called for by the trial Court

on the request of defendants therein, were not produced was not based on facts on records. Since the claim of plaintiff that the defendants committed default in payment of rent in respect of suit property on and from July, 1984 and since the defendants did not produce any document to rebut such claim of the plaintiff by calling for records of NJ cases w.e.f. July 1984, it needs to be held that defendants were defaulters in payment of rent in respect of suit premises w.e.f. July 1984.

13. It has also been contended that in their WS, the defendants had claimed that since the plaintiff started demanding rent at an exorbitant in months prior to July 1984, therefore, the defendants started depositing the rent in respect of suit premises in the court on and from July, 1984. However, in a reply to the pleader's notice, the respondents/defendants did not in that way since in reply notice, the defendants claimed that they paid rent to the plaintiff personally till June, 1986. However, from July, 1986 onwards, the defendants have regularly been paying rent to the plaintiff through the court.

14. Such a contrary stances on a matter as important as payment of rent in respect of suit premises clearly shows that the defendants defaulted in payment of rent in respect of such property since July 1984. Being so, there cannot be any escape from the conclusion that defendants committed default in payment of rent in respect of suit premises w.e.f. July 1984 as claimed by the plaintiff.

15. Even if one assumes for the sake of argument for a moment that the plea of default was not proved, even then, the learned trial Court has given cogent reason in regard to the claim of plaintiff that the suit premises is required for the bona fide use of the plaintiff. Without considering the correctness of such a decision on the issue of bona fide requirement of suit premises by the plaintiff, the learned Court below was pleased to set aside the entire judgment which is not permissible under the law.

16. The learned counsel for the appellant further submits that a case can be remanded to the trial court only on limited ground and the grounds on which a case can be remanded are found conspicuously lacking in the case in hand. In support of his various contentions, the learned counsel for the appellant has drawn my attention to the decision of this Court in the case of Biswajit Saha Vs. Shah Md. Farid & Anr. reported in (2009) 3 GLT 241, decision of Hon'ble Apex Court in the case of Bhairab Chandra Nandan Vs. Randhir Chandra Dutta reported in (1988) 1 SCC 383 as well as of this Court in Md. Nizam Uddin and Anr. Vs. Md. Mahmud Ali and Ors. reported in (1988) 2 GLR 115.

17. It has also been stated that the Court has no duty to take the side of any of the parties to a suit so as to help him to prove his/her case. It is for the party to adduce evidence and prove his or her case. In support of such contention, the decision of this Court in Abdul Matin Choudhury and Ors V. Nilyanand a Dutta Banik reported in (1997) 2 GLT 590 is relied on.

18. On the other hand, the learned counsel for the respondent/defendant No. 1 submits that all the records which were called for at the behest of respondents defendants were not be produced before the court by the concerned Clerk as is evident from the evidence of PW 2. According to learned counsel for the respondents/defendants, all those records were necessary to enable them to show that they were not defaulters in payment of rent in respect of suit premises.

19. Since the trial court abdicate its responsibility in helping the defendants in securing the production of those records before the court and that too only on the plea of concerned Clerk that he (concerned Clerk) could not trace out such records, such conclusion is unsustainable in law since it is not in tune with the law holding the field and which also resultantly caused enormous injustice to the defendants therein. Therefore, learned appellate Court has rightly set aside the judgment of the trial court.

20. Referring to the provision, incorporated in Order XLI Rule 23 of the CPC that the learned counsel for the respondents/defendants contends that the appellate Court has enough power to remand the case as and when such remand becomes necessary for due disposal of the case. According to the learned counsel for respondents/defendants, in the instant case, the learned Court below has rightly remanded the case to the trial Court for fresh decision after setting aside th

e judgment under challenge.

21. I have considered the rival submission having regard to the judgments of the courts below as well as evidence on record. On making such an exercise, I have found that the defendants have prayed for calling for records of NJ cases for the period from 1992 to 2001 vide Ext. 2. I have also found that all those records, which were called for, were produced before the trial court. Being so, the finding of the appellate Court that all the called for records of NJ cases were not produced before the court was not based on facts and records.

22. It is found that the specific allegation of the plaintiff /appellant was that the defendants started defaulting in payment of rent in respect of suit property w.e.f. July 1984. I have already found that it was the duty of defendants therein to controvert such claim of the plaintiff by producing and proving appropriate records. However, as stated above, same was not done and as such, there cannot be any escape from the conclusion that the claim of defendants that they paid rent in respect of suit property at all the material points of time remains far from being established.

23. One may notice here that the defendants in their reply to pleader's notice claim that they have been paying rent regularly to the plaintiff through the court from the month of July 1984. However, in their WS, they claimed that they started paying rent to the plaintiff through court w.e.f. July 1986. Such contrary statements on a matter as important as payment of rent do not advance the cause of defendants. Rather, such inconsistent pleas serve to show that defendants were defaulters in payment of rent in respect of suit house w.e.f. July 1984 as claimed by plaintiff.

24. It is a settled law that a tenant cannot run to the court straightway to deposit the rent. The tenant must tender the rent first to the landlord and on his refusal, he could deposit such rent to the court for being paid to the landlord. It also settled law that the tenant has to prove that he tendered the rent to the landlord and on such tender, landlord refused to accept the same. In the instant case, however, we did not notice any evidence to show that the defendants tendered the rent to the plaintiff and on his refusal, the defendants had to deposit such rent in the court.

25. We may note here that the tenant is required under the law to pay the rent in respect of suit premises even when the suit, filed by the landlord, seeking the ouster of his tenant on the allegation of later's being a defaulter and he remains under such duty throughout the trial. If the tenant defaults in payment of rent even during the pendency of the suit, he would be liable to be evicted for his being a defaulter. In our instant case, there is evidence to show that even during the trial, the defendants committed default in payment of rent and as such, on such ground as well, the defendants are liable to be evicted.

26. Above being the position, the finding of the learned appellate Court that the learned trial court did not properly address the issue relating to defendants being defaulters cannot be said to be sound and proper. Resultantly, the decision of the trial court that the defendants/respondents were defaulters in payment of rent in respect of suit premises during the period in question cannot be faulted.

27. In so far issue relating to bona fide requirement of the house by the plaintiff/appellant is concerned, I have found that such a finding has not been at all discussed by the learned appellate Court. In my opinion, without rendering its opinion on such an issue, the appellate Court could not have set aside the entire judgment for remanding the case to the trial Court for fresh decision.

28. However, on considering the decision of the learned trial Court on such an issue in the light of evidence on record, it is found that learned trial Court had correctly and adequately considered evidence on record and rightly came to the finding that the suit premises is required for bona fide use of the plaintiff. Being so, even if one assumes for one reason or other that the plaintiff could not prove that the defendants were defaulters in payment of rent in respect of suit premises, still then, on the ground of bona fide requirement, the appellate Court ought to have dismissed the appeal.

29. In view of above, I find that the judgment of the appellate Court remand

ing the case to the trial Court for fresh decision on the issues, more particularly, on the issue of defendants being defaulters in respect of suit premises is found to be unsustainable in law and therefore, same is liable to be set aside and quashed.

30. Resultantly, the appeal is allowed and the judgment of the appellate Court is, therefore, quashed and set aside.

31. Parties are to bear their own cost.

32. Return the LCR forthwith.